

## **Sample Language Regarding VA Benefits Eligibility**

**Instructions:** In all administrative separation actions for which a servicemember may lose eligibility for Department of Veterans Affairs (VA) benefits, convening authorities and their legal advisors should consider including additional information that is designed to assist VA benefits adjudicators in making more accurate and informed determinations on VA benefits eligibility. The paragraphs below are templates that commanders and their legal advisors may use in recommendation and decision documents to address specific statutory and regulatory bars that may prevent a former servicemember from receiving VA benefits. Additional explanation of each statutory and regulatory bar to benefits can be found in the main article. Additional legal research may be necessary for a particular case.

The templates in Section I are designed for use, where appropriate, in all administrative separation action recommendation and decision documents, to include Discharges in Lieu of Court-Martial. The template in Section II is designed solely for use, where appropriate, in Discharge in Lieu of Court-Martial decision documents.

### **I. All Administrative Separation Actions**

#### **1. Excluding Charge(s) and Specification(s) or Notified Offenses as a Basis for Discharge**

Add paragraph 1 if the convening authority does not wish to include a specific charged or notified offense as the basis for approving the administrative separation action. The application of several statutory and regulatory bars to VA benefits depends on the type and nature of the charged misconduct. Specifically excluding certain charged offenses from the basis of the separation can prevent the application of a statutory or regulatory bar that would deny a servicemember benefits.

This discharge is not based on the following charged offense(s): [Insert Charge(s) and Specification(s) that do not form any basis for the separation]. When making a decision on VA benefits eligibility, benefits adjudicators should not consider the offense(s) listed in this paragraph, as I did not consider these charged offense(s). [Optional: Insert additional explanation.]

#### **2. Excluding AWOL ≥ 180 Continuous Days as a Basis for Discharge**

If a servicemember is charged with or notified of a violation of Article 85, UCMJ, Desertion, or Article 86, UCMJ, AWOL for a period of continuous absence of at least 180 days, add paragraph 2 if the convening authority decides that the statutory bar to VA benefits for AWOL ≥ 180 Continuous Days should not apply, but wants to include AWOL for a continuous period of 179 days or less as a basis for the discharge. If a violation of Article 85, UCMJ, Desertion, is charged or notified, and the period of continuous absence is 180 days or greater, the convening authority should consider including both paragraph 1 and paragraph 2 if the basis of the discharge will include AWOL for a continuous period of 179 days or less. Statutory bars to benefits generally preclude receipt of VA health care benefits, while regulatory bars generally do not. The convening authority must ensure that a proper reason to grant the request remains. Additional explanation is permissible, but not required.

This discharge under other than honorable conditions is not issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. The statutory bar to benefits set forth in 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) for

absence without leave for a period of at least 180 continuous days should not apply.  
[Optional: Insert additional explanation.]

### **3. Compelling Circumstances Recommendation for Continuous AWOL ≥ 180 Days**

If an accused is charged with or notified of a violation of Article 86, UCMJ, AWOL for a continuous period of at least 180 days, and the convening authority does not use paragraphs 1 or 2 to make an affirmative finding that the administrative separation with an OTH characterization of service is not based on a continuous period of AWOL for at least 180 days, the accused will likely be statutorily barred from VA benefits. If the accused is statutorily barred, paragraph 3 assists the convening authority in making a recommendation to VA benefits adjudicators that there were compelling circumstances that warranted the prolonged unauthorized absence for the purpose of VA benefits. This is simply a recommendation to VA benefits adjudicators in the event that the accused later applies for VA benefits. While this recommendation may persuade VA benefits adjudicators to apply the compelling circumstances exception to this statutory bar, it neither prevents the initial application of the statutory bar, nor guarantees future eligibility for VA benefits.

Because this discharge is based on a violation of Article 86, UCMJ, Absence Without Leave, for a period of at least 180 continuous days, 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) may serve as a statutory bar to VA benefits. I find, however, that for the purposes of VA benefits eligibility, there are compelling circumstances that warranted the prolonged unauthorized absence. While these compelling circumstances do not present a valid legal defense, they are sufficiently extenuating and mitigating for me to recommend that this statutory bar to benefits not apply. In making this determination, I have considered the [length and character of service exclusive of the period of prolonged AWOL] [and] [the reasons that the accused has given for the period of prolonged AWOL. I have evaluated these reasons in terms of the accused's age, cultural background, educational level and judgmental maturity [, to include the [hardship][and][suffering] [incurred as a result of overseas service] [,][and] [as a result of combat wounds] [,][and] [other service incurred or aggravated disability]. [Optional: Insert additional explanation.]

### **4. Recommendation Against Moral Turpitude Bar to VA Benefits**

Add paragraph 4 if the convening authority does not believe that an/the offense(s) on which the discharge is based involve(s) moral turpitude. Granting an administrative separation with an OTH characterization of service generally serves as a regulatory bar to VA benefits if an offense involving moral turpitude forms part or all of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based do(es) not involve moral turpitude for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(3) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve moral turpitude because [, for the offenses on which this discharge is based, a Dishonorable Discharge/Dismissal is not among the permissible sentences at a court-martial,] [,] [none of the offense(s) are analogous to a felony level offense under the circumstances] [,] [all absence offenses on which this discharge is based did not occur during times of War or national peril] [,] [and] [military courts and the Manual for Courts-Martial have not recognized the offense(s) on which this discharge is based as constituting crimes involving moral turpitude]. [Optional: Insert additional or alternate explanation.]

## **5. Recommendation Against Willful and Persistent Misconduct Bar to VA Benefits**

Add paragraph 5 if the convening authority does not believe that an/the offense(s) on which the discharge is based constitute(s) willful and persistent misconduct. Granting an administrative separation with an OTH characterization of service generally serves as a regulatory bar to VA benefits if misconduct determined to be willful and persistent forms at least part of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based (was)(were) not willful and persistent misconduct for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(4) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve willful and persistent misconduct because [it involves] [they all share a nexus in] a single incident and should rightfully be considered a single one-time event] [,] [the offense(s) on which this discharge is based did not materially interfere with or prevent the accused's ability to meaningfully perform military duties], [the offense(s) was/were minor in nature and the accused's conduct was otherwise Honest, Faithful, and Meritorious]. [Optional: Insert additional explanation.]

## **6. Proper Use of These Findings and Recommendations**

Paragraph 6 is recommended in all cases for which the convening authority includes information regarding VA benefits. This paragraph clarifies the limited purposes of the convening authorities findings and recommendations regarding VA benefits determinations.

These findings and recommendations are solely for the purpose of assisting VA benefits adjudicators in making their decisions on eligibility for VA benefits. I have made the findings and recommendations in this paragraph after being advised by my Staff Judge Advocate on the applicable legal standards, definitions, and regulations. These recommendations are not made for any purpose other than assisting with determining the appropriate VA benefits determination.

## **7. Statement of Gratuitous Nature of VA Benefits Findings and Recommendations**

Paragraph 7 is recommended in all cases for which the convening authority includes information regarding VA benefits. Convening Authorities, Judge Advocates, and other legal counsel are advised against negotiating for the inclusion of VA benefits-related language. Because VA and other judicial officials retain complete authority to make VA benefits eligibility determinations, convening authorities have neither the statutory nor regulatory authority to make final determinations on VA benefits eligibility. Convening authorities also have no authority to make binding precedential determinations regarding the interpretation of VA-related statutes and regulations. In addition, many controlling regulations do not provide any authority for an accused to include conditional language as a part of a request for discharge in lieu of court-martial. The accused and defense counsel should request the inclusion of VA benefit-related language as matters that accompany the request for discharge in lieu of court-martial. Defense Counsel should consider whether or not the request is protected under Military Rule of Evidence 410.

No member of the command has made any promises, assurances, or other representations to the accused or defense counsel regarding the accused's eligibility for veterans benefits. There was no negotiation with the accused or defense counsel for the inclusion of any veterans benefits-related language in this approval document. The

determinations, findings, and recommendations in this paragraph were not made in exchange for anything. I believe that granting this is the correct action in this case regardless of any final decision on the accused's eligibility for VA benefits. I have taken this action and made these specific findings and recommendations regarding VA benefits eligibility with full knowledge that VA and other judicial officials are the proper arbiters of VA benefits eligibility determinations. If the determinations, findings, and recommendations included in this paragraph are found to be legally invalid, inapplicable, or unpersuasive, or they do not result in the preservation of any VA benefits for the accused, this separation action shall remain valid, and the characterization of discharge shall remain unchanged unless upgraded or otherwise modified by another proper administrative, judicial, or legal process.

## **II. Discharges In Lieu of Court-Martial**

### **8. All Discharges In Lieu of Court-Martial Granted Without Prior GCM Referral**

Add paragraph 8 in all cases for which a request for discharge in lieu of court-martial is granted without a prior referral to general court-martial. While other statutory or regulatory bars to VA benefits may apply, adding this paragraph will help to prevent VA benefits adjudicators from mistakenly applying VA regulatory bar to benefits for servicemembers discharged to avoid trial by general court-martial.

This is not a discharge to escape trial by general court-martial, as the charges and specifications have not been referred to general court-martial. Accordingly, the regulatory bar to VA benefits set forth in 38 C.F.R. § 3.12(d)(1) for acceptance of an undesirable discharge to avoid trial by general court-martial should not apply.